

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS A. CENSKE,

Case No. 5:04-CV-107

Plaintiff,

Hon. Richard Alan Enslen

v.

CLINTON COUNTY SHERIFF
DEPARTMENT, *et al.*,

ORDER

Defendants. /

This matter now before the Court on Plaintiff Thomas A. Censke's Motion for Reconsideration of the Court's June 27, 2006 Order and Judgment adopting the Report and Recommendation ("Report") of United States Magistrate Judge Ellen S. Carmody, granting Defendants' Motion for Summary Judgment, and dismissing Plaintiff's Complaint. Under Rule 7.4(a), Plaintiff must demonstrate that the Court's Order suffers from a palpable defect, and must "also show that a different disposition of the case must result from a correction thereof." W.D. MICH. LCIVR 7.4(a). The Court also construes this as a Motion for Relief from Judgment pursuant to Rule 60(b)(1), for reason of mistake, inadvertence, surprise, or excusable neglect. FED. R. CIV. P. 60(b)(1).

Plaintiff filed a Notice of Appeal to the Sixth Circuit Court of Appeals on August 18, 2006, after filing this Motion for Reconsideration. In accordance with its letter of September 14, 2006, the Sixth Circuit is holding the appeal in abeyance under Fed. R. App. P. 4(a)(4), as it was noted this Motion had yet to be decided. This Court retains jurisdiction to determine a pending Rule 60(b) Motion, and the notice of appeal is held in abeyance pending ruling. *Post v. Bradshaw*, 422 F.3d 419, 422 (6th Cir. 2005); *see also* FED. R. APP. P. 4(a)(4) advisory committee's notes to 1993 Amendment ("a notice of appeal filed before the disposition of a specified post-trial motion will become effective upon disposition of the motion.")

Upon review, the Court agrees with Plaintiff that his Objection to the Report was filed within ten days of its entry pursuant to 28 U.S.C. § 636(b)(1)(C). Therefore, the Court's Order Adopting the Report, filed on June 27, 2006, was procedurally in error. Further, the Court notes that Plaintiff was granted an extension of time to file a Sur-Reply pursuant to Federal Rule of Civil Procedure 56(f) until June 29, 2006. This Sur-Reply was deposited in the prison mail system within the designated time period, but was not considered by the Magistrate Judge in her Report. Nevertheless, after careful *de novo* review of the voluminous record, including but not limited to Plaintiff's newly submitted discovery and Sur-Reply pursuant to Rule 56(f), the Court finds no evidence that supports a different disposition from Judge Carmody's Report. *See* W.D. MICH. LCIVR 7.4(a).

THEREFORE, IT IS HEREBY ORDERED that Plaintiff Thomas A. Censke's Motion for Reconsideration (Dkt. No. 139) is **DENIED**.

DATED in Kalamazoo, MI:
November 14, 2006

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
SENIOR UNITED STATES DISTRICT JUDGE